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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1373

REPUBLICAN NATIONAL COMMITTEE, et al.,
Appellants,

v.

FEDERAL ELECTION COMMISSION, et al.,
Appellees.

On Appeal from the United States District Court for the Southern District of New York

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MOTION OF THE FEDERAL ELECTION COMMISSION TO AFFIRM

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INDEX

	Page
OPINIONS BELOW	1
JURISDICTION	2
STATUTES INVOLVED	2
QUESTIONS PRESENTED	2
STATEMENT OF THE CASE	3
ARGUMENT	6
THE QUESTIONS PRESENTED BY THIS APPEAL ARE SO UNSUBSTANTIAL AS NOT TO NEED FURTHER ARGUMENT	6
I. The Court upheld the constitutionality of public financing of presidential campaigns in *Buckley* v. *Valeo*	8
II. Appellants' claims that public financing imposes an unconstitutional condition upon candidates and infringes rights of supporters are unsupported	10
III. Appellants' claim that the advantages of incumbency render public financing discriminatory against challengers is unsupported by the record	15
IV. Appellants' claim that the statutes discriminate against candidates not supported by labor organizations is wholly unsupported by the record	17
V. Appellants submitted no evidence in support of their claims that the statutes are overbroad and in violation of the ninth amendment; both claims were rejected by this Court in *Buckley* v. *Valeo*	17
VI. Appellants cannot obtain the relief they seek	18
CONCLUSION	20

Cases: Page

American Communications Association v. *Douds*, 339 U.S. 382 (1950) 11
Broadrick v. *Oklahoma*, 413 U.S. 601 (1973) 18
Buckley v. *Valeo*, 424 U.S. 1 (1976) 3, 7, 8, 9, 11, 15, 16, 17, 18, 19
Dandridge v. *Williams*, 397 U.S. 471 (1970) 12
Erznoznik v. *City of Jacksonville*, 422 U.S. 205 (1975) 18
Flemming v. *Nestor*, 363 U.S. 603 (1960) 12
Griffin v. *Illinois*, 351 U.S. 12 (1956) 16
Griswold v. *Connecticut*, 381 U.S. 479 (1965) 18
Katzenbach v. *Morgan*, 384 U.S. 641 (1966) 16
Marchioro v. *Chaney*, 442 U.S. 191 (1979) 14-15
Oklahoma v. *Civil Service Commission*, 330 U.S. 127 (1947) 11
Richardson v. *Belcher*, 404 U.S. 78 (1971) 12
Roschen v. *Ward*, 279 U.S. 337 (1929) 16
Ross v. *Moffitt*, 417 U.S. 600 (1974) 16
San Antonio Independent School District v. *Rodriguez*, 411 U.S. 1 (1973) 16
United Public Workers v. *Mitchell*, 330 U.S. 75 (1947) 18
United States v. *Robel*, 389 U.S. 258 (1967) 18
United States Civil Service Commission v. *National Association of Letter Carriers*, 413 U.S. 548 (1973) 18
Welsh v. *United States*, 398 U.S. 333 (1970) 19
Williamson v. *Lee Optical*, 348 U.S. 483 (1955) 16
Wyman v. *James*, 400 U.S. 309 (1971) 11

United States Constitution: Page

First Amendment 4, 5, 6, 8, 13, 14, 18
Fifth Amendment 4, 5, 6, 8
Ninth Amendment 4, 5, 6, 8, 17, 18

Statutes:

2 U.S.C. § 431 ..... 2, 4
2 U.S.C. § 431(8)(B)(i) 13
2 U.S.C. § 431(8)(B)(ii) 13
2 U.S.C. § 431(8)(B)(iii) 13
2 U.S.C. § 431(8)(B)(iv) 13
2 U.S.C. § 431(8)(B)(x) 13
2 U.S.C. § 431(8)(B)(xi) 13
2 U.S.C. § 431(8)(B)(xii) 13
2 U.S.C. § 431(9)(B)(viii) 13
2 U.S.C. § 431(9)(B)(ix) 13
2 U.S.C. § 437h 5
2 U.S.C. § 441a(b)(1)(B) 4, 5, 6
2 U.S.C. § 441b 17
18 U.S.C. § 608(c)(1)(B) 9
26 U.S.C. § 9001 ..... 2, 3
26 U.S.C. § 9003 4
26 U.S.C. § 9004 4
26 U.S.C. § 9011(b) 2, 4
26 U.S.C. § 9031 3

Legislative History:

Pub. L. No. 92-225, 86 Stat. 3 (1972) 4
Pub. L. No. 93-443, 88 Stat. 1263 (1974) 4
Pub. L. No. 94-283, 90 Stat. 475 (1976) 4

Page

Pub. L. No. 95-216, 91 Stat. 1655 (1977) 4
Pub. L. No. 96-187, 93 Stat. 1339 (1980) 4, 12, 13
119 Cong. Rec. 14,489 (1973) 7
119 Cong. Rec. 14,718 (1973) 7, 11
119 Cong. Rec. 14,719 (1973) 7, 11
119 Cong. Rec. 14,720 (1973) 7
119 Cong. Rec. 14,722 (1973) 7
119 Cong. Rec. 14,725 (1973) 7, 11
119 Cong. Rec. 14,726 (1973) 7
119 Cong. Rec. 14,729 (1973) 7
119 Cong. Rec. 14,737 (1973) 7, 11
119 Cong. Rec. 14,739 (1973) 7
119 Cong. Rec. 14,828 (1973) 7, 11
119 Cong. Rec. 14,889 (1973) 7
119 Cong. Rec. 15,087 (1973) 7
119 Cong. Rec. 25,985 (1973) 11
119 Cong. Rec. 38,900 (1973) 11
120 Cong. Rec. 8775 (daily ed., March 28, 1974) 7
120 Cong. Rec. 10,546 (1974) 11
S. Rep. No. 93-689, 93d Cong., 2d Sess. (1974) 11, 20
H. Rep. No. 93-1239, 93d Cong., 2d Sess. (1974) 11
H. Rep. No. 96-422, 96th Cong., 1st Sess. (1979) 13
Hearings on S.382 before the Subcommittee on Privileges and Elections of the Senate Committee on Rules and Administration, 92d Cong., 1st Sess. (1971) 11
Hearings on S.1103, S.1954 and S. 2417 before the Subcommittee on Privileges and Elections of the Senate Committee on Rules and Administration, 93d Cong., 1st Sess. (1973) 11

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Appellee Federal Election Commission moves to affirm the decision of the three-judge court on the grounds that the questions presented were correctly decided by the court below and are so unsubstantial as not to need further argument.

OPINIONS BELOW

The opinions below, joint findings of fact of the three-judge court and the single judge and the opinion

of the three-judge court, are set forth in appellants' appendix to the jurisdictional statement in No. 79-1373. These opinions are not yet reported. The opinion of the district court convening the three-judge court is reported at 461 F.Supp. 570.

JURISDICTION

This appeal is brought pursuant to 26 U.S.C. § 9011 (b) which provides for appeal to the Supreme Court of a decision of a three-judge court convened to implement or construe any provision of the Presidential Election Campaign Fund Act, 26 U.S.C. § 9001, *et seq.* Pursuant to 26 U.S.C. § 9011(b) appellants seek to have the Court expedite its consideration of this case. Section 9011(b) does not require the Court to hear further argument on a case where the questions are so unsubstantial as not to need further argument, and for the reasons set forth in the Argument, *infra,* the Commission opposes appellants' motion to expedite.

STATUTES INVOLVED

This appeal challenges provisions of the Presidential Election Campaign Fund Act, 26 U.S.C. § 9001, *et seq.,* and also involves certain provisions of the Federal Election Campaign Act of 1971, as amended, 2 U.S.C. § 431, *et seq.* The full text of both statutes is set forth in appellants' appendix to the jurisdictional statement in No. 79-1373.

QUESTIONS PRESENTED

Whether this Court should affirm the unanimous decision of the three-judge court, rendered after full consideration of the issues, that appellants' complaint does not state any claim based on the unconstitutionality of the Presidential Election Campaign Fund Act, 26 U.S.C. § 9001, *et seq.*

Whether this Court should hear further argument where the questions presented by appellants were decided by this Court in *Buckley* v. *Valeo,* 424 U.S. 1 (1976).

STATEMENT OF THE CASE

This case and Nos. 79-1374 and 79-1375 arose from a single complaint which was dismissed by three unanimous courts. In order to avoid unnecessary duplication of argument, the complete statement of the case and the reasons why the decisions of the courts below should be affirmed are set forth fully in this motion only. Additional jurisdictional questions as to Nos. 79-1374 and 79-1375 are addressed separately in the Commission's motion to dismiss or, in the alternative, to affirm in No. 79-1375, and in the Commission's brief in opposition to petition for writ of certiorari in No. 79-1374.

On June 16, 1978, appellants, Republican National Committee, the Ripon Society of New York and two individuals, filed a complaint in the district court seeking declaratory and injunctive relief against certain provisions of the Presidential Election Campaign Fund Act, 26 U.S.C. § 9001, *et seq.,* Subtitle H, Chapter 95, Internal Revenue Code (hereafter the "Fund Act")[1] and the Federal Election Campaign Act of

[1] Subtitle H of the Internal Revenue Code includes Chapter 95, the Presidential Election Campaign Fund Act, and Chapter 96, the Presidential Primary Matching Payment Account Act, 26 U.S.C. § 9031, *et seq.* Although appellants' challenge is limited to the Fund Act (Chapter 95), a decision by this Court holding that expenditure limitation invalid would raise serious implications for

1971, as amended, 2 U.S.C. § 431, *et seq.* (hereafter "FECA").[2] (The Fund Act and FECA are collectively referred to hereafter as the "statutes"). Appellants challenge the constitutionality under the first, fifth and ninth amendments of the requirement that candidates, in order to be eligible to receive public funds under the Fund Act, certify to the Federal Election Commission that they will not incur qualified campaign expenses in excess of the aggregate amount of their entitlement under the Fund Act,[3] and that they have not and will not accept any private contributions except insofar as necessary to make up any deficiency in the Fund. 26 U.S.C. §§ 9003, 9004; 2 U.S.C. § 441a(b)(1)(B).

Appellants filed a motion for convening a three-judge court pursuant to 26 U.S.C. § 9011(b) on September 22, 1978. The three-judge court was convened on January 3, 1979. The Commission filed a motion to dismiss and a motion to certify constitutional questions to the court of appeals *en banc* pursuant to

Chapter 96 which contains the parallel expenditure limitation for the public funding of presidential primary campaigns. Under Chapter 96, a candidate receives matching federal payments for private contributions of up to $250 and agrees to adhere to a $10 million spending limitation. Thus, although there is a spending ceiling for the candidate, individuals are free to make contributions.

[2] The Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972) has been amended as follows: Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (1974); Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, 90 Stat. 475 (1976); Federal Election Campaign Act Amendments of 1977, Pub. L. No. 95-216, 91 Stat. 1655 (1977); Federal Election Campaign Act Amendments of 1979, Pub. L. No. 96-187, 93 Stat. 1339 (1980).

[3] $29,440,000.00 for each candidate in 1980.

2 U.S.C. § 437h on February 20, 1979, which were heard by the three-judge court on May 8, 1979. The court ordered the parties to expedite development of a record "in the form of transcripts of whatever depositions are to be submitted plus any statistical proof" for submission of the constitutional issues. Appellants filed their evidentiary submission, a trial memorandum and proposed findings of fact with the three-judge court on June 8, 1979, and on June 18, 1979, appellees filed their evidentiary submission, a brief and proposed findings of fact. Both parties submitted proposed constitutional questions for certification to the court of appeals *en banc*. Appellants' rebuttal submission was filed on June 22, 1979.

On October 12, 1979, the single district judge and the three-judge court issued joint findings of fact, App.[4] at 3a-43a (hereafter "Joint Findings, App. at ——"), and the single judge certified to the court of appeals a question as to the constitutionality of 2 U.S.C. § 441a(b)(1)(B).[5] An expedited briefing schedule was estab-

[4] Citations to the Joint Findings and to the Opinion of the three-judge court are to appellants' appendix in No. 79-1373.

[5] Does 2 U.S.C. § 441a(b)(1)(B) violate the rights of one or more of the plaintiffs under the First, Fifth or Ninth Amendment to the Constitution—

(a) by preventing a major party presidential candidate who accepts public financing for his general election campaign from making campaign expenditures in excess of the limits set forth therein;

(b) by preventing a major party presidential candidate who accepts public financing for his general election campaign from accepting, and preventing other persons from giving, campaign contributions (including expenditures coordinated with the candidates' campaign) to that campaign;

(c) by discriminating invidiously against major party presidential candidates who are challenging incumbents;

(d) by being overbroad?

lished in the court of appeals by motion of the appellants and consent of the appellees, and briefing was completed on November 28, 1979. On February 5, 1980, the three-judge court issued its opinion, App. at 44a-63a (hereafter "Opinion, App. at ——"), dismissing the complaint insofar as it sought to challenge the constitutionality of the Fund Act. On February 6, 1980, the court of appeals answered the certified questions in the negative, finding that 2 U.S.C. § 441a(b)(1)(B) does not violate the First, Fifth or Ninth Amendments to the United States Constitution. App. at 67a-69a.

The final judgment of the three-judge court was entered on February 13, 1980, App. at 1a-2a, and upon request of appellants, the single judge entered a separate judgment on February 19, 1980. App. in 79-1374 at 1a-2a. Appellants filed their notices of appeal on February 19, 1980, App. at 70a-71a, and their jurisdictional statements in Nos. 79-1373 and 79-1375 on March 7, 1980. In No. 79-1374, appellants filed a petition for pre-judgment certiorari on March 7, 1980. Appellants seek establishment of an expedited briefing schedule and oral argument this term in order that this Court may render its decision before the July 1980 presidential nominating convention.

ARGUMENT

THE QUESTIONS PRESENTED BY THIS APPEAL ARE SO UNSUBSTANTIAL AS NOT TO NEED FURTHER ARGUMENT

Appellants seek to have the Court consider this case on an expedited basis because of the imminency of the 1980 general election. Precisely because of the timing of this appeal, the unanimous decisions of all three

courts below, which fully considered and correctly rejected appellants' claims, the Commission submits that this case is one highly appropriate for summary affirmance by the Court.

Appellants seek to have this Court transform what Congress designed as an optional alternative to private funding of presidential campaigns into a $29,440,000.00 subsidy for major party candidates, Juris. Statement at 12 n.6, even though this clearly would be contrary to the intent of Congress, as this Court noted in *Buckley* v. *Valeo,* 424 U.S. at 99.[8] The courts below provided appellants with a full opportunity to prove their claims, fully considered the issues, and rejected each of appellants' claims both on the grounds that they failed to prove facts sufficient to substantiate their claims and that, even if the record supported their claims, the statutes would not thereby be unconstitutional.

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[8] The legislative history supports the conclusion that public financing as designed by Congress depends upon the prohibition on private funding to achieve its purposes: 119 Cong. Rec. 14,489 (1973) (remarks of Sen. Cranston); 119 Cong. Rec. 14,722 (1973) (remarks of Sen. Biden); 119 Cong. Rec. 14,726 (1973) (remarks of Sen. Schweiker); 119 Cong. Rec. 14,729 (1973) (remarks of Sen. Hart); 119 Cong. Rec. 14,889 (1973) (remarks of Sen. Cranston); 119 Cong. Rec. 14,718 (1973) (remarks of Sen. Mondale); 119 Cong. Rec. 14,720 (1973) (remarks of Sen. Muskie); 119 Cong. Rec. 15,087 (1973) (remarks of Sen. Humphrey); 120 Cong. Rec. 8775 (daily ed., March 28, 1974) (remarks of Sen. Hollings); 119 Cong. Rec. 14,719 (1973) (remarks of Sen. Biden); 119 Cong. Rec. 14,725 (1973) (remarks of Sen. Schweiker); 119 Cong. Rec. 14,725 (1973) (remarks of Sen. Clark); 119 Cong. Rec. 14,737 (1973) (remarks of Sen. Cranston); 119 Cong. Rec. 14,739 (1973) (remarks of Sen. Kennedy); 119 Cong. Rec. 14,828 (1973) (remarks of Sen. McGovern).

Appellants' case is based solely on the experience of the 1976 election, the first in which public financing of presidential campaigns operated. The courts below accurately characterized the "evidence," finding that it does not support appellants' claims, and that, in any event, it is of limited value since based upon only one election:

> The 1976 campaign was a single election, and the strategies adopted by the candidates and the budgetary impact of those strategies, do not necessarily reflect the optimal strategies and spending patterns available to the candidates in that campaign [and] cannot be utilized to predict strategies and spending decisions in future campaigns when the issues, personalities and political climate will undoubtedly be different.

Joint Findings, App. at 35a.

I. The Court Upheld the Constitutionality of Public Financing of Presidential Campaigns in *Buckley* v. *Valeo*.

The constitutionality of public financing was one of four major issues considered by this Court in *Buckley* v. *Valeo*, 424 U.S. 1 (1976). Part three of the Court's four-part opinion contained a comprehensive review of the Fund Act (and Chapter 96), upholding its constitutionality. 424 U.S. at 85-109. This Court specifically reviewed the Presidential Election Campaign Fund Act under the first, fifth and ninth amendments.[7]

[7] The following question was certified to this Court and answered in *Buckley* v. *Valeo*, 424 U.S. at 108:

> 5. Does any statutory provision for the public financing of political conventions or campaigns for nomination or election to the Presidency or Vice Presidency violate the rights of one or more of the plaintiffs under the First or Ninth Amendment, the Due Process Clause of the Fifth Amendment, or Article I, Section 8, Clause 1, of the Constitution of the United States?
>
> Answer: NO.

Buckley v. *Valeo*, 424 U.S. at 86, 93. Appellants' challenge in this case is to the expenditure limitation to which candidates who opt for public funding agree to adhere. Yet the Court's analysis of public financing in *Buckley* was premised on the existence of that limitation and the Court's decision specifically upheld its constitutionality. 424 U.S. at 57 n.65, 88 n.120, 95 n.129, 101, 103 n.139, 109.

Indeed, this Court stated:

> Congress may engage in public financing of election campaigns and may condition acceptance of public funds on an agreement by the candidate to abide by specified expenditure limitations.

424 U.S. at 57 n.65. Appellants contend that this decision is mere dictum, and they are essentially asking this Court to reconsider its decision in *Buckley*. The three-judge court rejected appellants' contention and held that the conclusion upholding the expenditure limitation was central to this Court's ruling:

> The plaintiffs argue that this passage is mere dictum. We do not agree. It was because of the expenditure limitations that the Court upheld the campaign fund against the constitutional challenge of minor parties.

Opinion, App. at 51a n.6.

The *Buckley* decision, throughout its analysis of public funding, relied upon the expenditure limitation, finding it central to the Court's holding that minor parties are not disadvantaged, 424 U.S. at 95 n.129, 99, 101, 103 n.139, finding it severable from the overall spending ceilings contained then in 18 U.S.C. § 608(c)(1)(B), 424 U.S. at 88 n.120, finding that the

absence of private contributions to major party candidates may improve the fundraising abilities of non-major party candidates, 424 U.S. at 94 n.128, 99, and finding that one of the primary purposes served by public financing is to free candidates at their option from the rigors of fundraising (which would be an impossible goal to achieve without a total ban on private contributions and without spending limits). 424 U.S. at 91, 96.

II. Appellants' Claims That Public Financing Imposes An Unconstitutional Condition Upon Candidates and Infringes Rights of Supporters Are Unsupported.

The courts below found that neither the statutes nor the evidence support appellants' contention that candidates are compelled to accept public financing and to adhere to the expenditure limitation.[8] Joint Findings, App. at 28a-29a; Opinion, App. at 50a. The courts correctly rejected appellants' premise that it is impermissible for Congress to offer candidates a choice

[8] Appellants contend that candidates are forced to choose between "limited" private financing and "limited" public funds. Juris. Statement at 10. This characterization of the choice was explicitly rejected by the courts below which concluded that a "candidate remains free to engage in *unlimited* private funding and spending instead of limited public funding." Opinion, App. at 51a (emphasis added). The courts further rejected appellants' evidence as to the lack of a private funding alternative, which was based on the testimony of one individual who was not even qualified as an expert fundraiser. The courts found "that Black's analysis of the overall fundraising potential of presidential campaigns rests upon several doubtful assumptions," Joint Findings, App. at 26a, and rejected appellants' analysis of the cash flow problems of a privately funded campaign, finding that "media, one of the largest and most critical campaign expenditures, must be paid for only several days, not several months, in advance." Joint Findings, App. at 28a.

between two methods of exercising the same constitutional right. Opinion, App. at 52a. The conditions attached to public financing do not infringe the first amendment rights of candidates, Opinion, App. at 53a, and moreover, compelling governmental interests support those conditions and would have led the courts to uphold them even had appellants demonstrated that there were some incidental restrictions.[9] Opinion, App. at 54a. Where congressional spending furthers first amendment values, as does public financing, *Buckley* v. *Valeo,* 424 U.S. at 93, Congress' power to condition its terms is quite extensive. *Oklahoma* v. *Civil Service Commission,* 330 U.S. 127 (1947); *American Communications Association* v. *Douds,* 339 U.S. 382, 417 (1950) (Frankfurter, J., concurring). *See Wyman* v.

[9] These interests—to reduce the deleterious influence of large contributions on our political process, to facilitate communication by candidates with the electorate, and to free candidates from the rigors of fundraising—were identified by this Court. *Buckley* v. *Valeo,* 424 U.S. at 91, 96. *See* 119 Cong. Rec. 14,718 (1973) (remarks of Sen. Mondale); 119 Cong. Rec. 14,719 (1973) (remarks of Sen. Biden); 119 Cong. Rec. 14,725 (1973) (remarks of Sen. Schweiker); 119 Cong. Rec. 14,725 (1973) (remarks of Sen. Clark); 119 Cong. Rec. 14,737 (1973) (remarks of Sen. Cranston); 119 Cong. Rec. 14,828 (1973) (remarks of Sen. McGovern); S. Rep. No. 93-689, 93rd Cong., 2d Sess. 5 (1974); *Hearings on S.382 before the Subcommittee on Privileges and Elections of the Senate Committee on Rules and Administration,* 92d Cong., 1st Sess. 78 (1971); *Hearings on S.1103, S.1954 and S.2417 before the Subcommittee on Privileges and Elections of the Senate Committee on Rules and Administration,* 93d Cong., 1st Sess. 207 (1973); H. Rep. No. 93-1239, 93d Cong., 2d Sess. 3-4 (1974); 119 Cong. Rec. 38,900 (1973) (remarks of Sen. Pastore); 120 Cong. Rec. 10,546 (1974) (remarks of Sen. Hart); *Hearings on S.1103, S.1954 and S.2417 before the Subcommittee on Privileges and Elections of the Senate Committee on Rules and Administration,* 93d Cong., 1st Sess. 70 (1973); 119 Cong. Rec. 25,985 (1973) (remarks of Sen. Long).

James, 400 U.S. 309 (1971); *Richardson* v. *Belcher,* 404 U.S. 78 (1971); *Dandridge* v. *Williams,* 397 U.S. 471, 486 (1970); *Flemming* v. *Nestor,* 363 U.S. 603 (1960).

Appellants argue that the choice whether or not to accept public financing is a difficult one because the certainty of the sum as well as other advantages make it such an attractive alternative. From this they conclude that there is no real choice for a candidate but to opt for a publicly financed campaign.[10] The courts rejected that conclusion, finding that, if the public monies provide a candidate with substantial advantages, then it follows not that the statutes are unconstitutional, but rather that public financing enhances and enlarges a candidate's ability to exercise his or her first amendment rights.[11] Opinion, App. at 53a-54a.

The corollary to the expenditure limitation is the agreement by the candidate not to accept private con-

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[10] Appellants contend that Congress set the contribution limit at $1,000 believing that it would be low. In support of this argument, they cite to the report prepared by the Kennedy School, Juris. Statement at 11 n.5, which concluded that the limit was set too low in 1974. This very study was commissioned by the Committee on House Administration to evaluate the impact of FECA, and demonstrates that Congress is attentive to the impact of the Act. Indeed, Congress' responsiveness to unintended consequences of FECA is further evidenced by the 1979 Amendments to FECA, Pub. L. No. 96-187 (1980), which increased the ability of individuals to make contributions coordinated with publicly financed presidential campaigns. *See* note 12 *infra.*

[11] Although the courts below recognized that a candidate may encounter some risk in rejecting public funding, they further found that "it is a risk that can be measured on the basis of the candidate's fundraising experience during the primaries. Moreover, the candidate may have excess funds from his primary campaign . . .". Joint Findings, App. at 27a.

tributions. That agreement is essential to furtherance of the purposes of public financing because a candidate may spend only his entitlement under the Fund Act. Opinion, App. at 54a. *See* note 6 *supra.* Appellants assert, however, that as a result of a candidate's decision not to accept private contributions, the first amendment rights of individuals are infringed because they may not make contributions directly to a candidate who chooses public financing. The statutes do not restrict the abilities of individuals to participate in political campaigns, but rather provide other avenues for the funding of such individual activities.[12] In addi-

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[12] Contrary to appellants' misstatements of the law, the Act provides alternative avenues for individuals to participate in the funding of so-called local "grass roots" activities, by exempting funds spent on certain volunteer activities from the definitions of "contribution" and "expenditure". 2 U.S.C. §§ 431(8)(B)(i), (ii), (iii), (iv), (x), (xi), (xii), and 431(9)(B)(viii), (ix). Many of the examples set forth by appellants as "illegal," Juris. Statement at 20, would fall within these exemptions. Others, unless independent of a campaign, must be funded by the campaign or by a party committee.

Appellants' statements that the statutes prohibit individuals from spending modest amounts on a campaign for any political activities are thus simply untrue. Indeed, the 1979 Amendments to the Act, Pub. L. No. 96-187 (1980), which became effective on January 8, 1980, increased from $500 to $1,000 the exemptions which permit individuals to hold campaign volunteer activities in their homes or community rooms, in full coordination with a candidate's campaign. The Amendments also increased from $500 to $1,000 the exemption which permits individuals to travel on behalf of a campaign, paying their own expenses for transportation, food and lodging.

In addition, the Amendments specifically created a new exemption to permit state and local party organizations to fund "grass roots" activities, fully coordinated with presidential campaigns, without limit. 2 U.S.C. §§ 431(8)(B)(x) and (9)(B)(viii); H. Rep. No. 96-422, 96th Cong., 1st Sess. 9-10 (1979). Although this

tion, the courts noted the many avenues, other than the making of direct contributions, available to individuals in a publicly funded campaign, and found that supporters are left with a wide range of ways to express their support, including certain activities coordinated with the presidential campaign. Opinion, App. at 55a.

The courts further rejected appellants' conclusion that the voluntary choice by a candidate to forego private contributions results in infringement of first amendment rights of potential contributors.[13] A candidate has the right to choose the manner of funding his or her campaign and may decide not to accept private contributions without infringing any rights of supporters. Opinion, App. at 55a. "As in *Marchioro*

provision has not yet been operative during a presidential campaign, appellants seemingly negate its potential effect. Juris. Statement at 23 n.13. Moreover, despite their contention that there are numerous individuals desirous of making contributions to a candidate and who wish to engage in grass roots activities, they dismiss this new exemption stating that funding will not be available. Yet the entire purpose of the new exemption is to permit those individuals, on whose behalf appellants bring this suit, to make contributions to party committees for grass roots activities and to participate in those activities in full coordination with candidates' campaign committees.

[13] Appellants misleadingly assert that the parties and the court agree that the impact of the statutes on "grass roots" activities was "dramatic." Juris. Statement at 22. On the contrary, the courts found a variety of factors other than the challenged statutes which contributed to any perceived decline in such activities in 1976, finding that "[e]ven prior to 1976, presidential campaigns emphasized mass media and television in particular, at the expense of grass roots activities," Joint Findings, App. at 21a, and that "[t]he *impact of these budgetary policies* [of the presidential campaigns in 1976] upon various forms of grass roots activities was *dramatic*." Joint Findings, App. at 16a (emphasis added).

v. *Chaney,* 442 U.S. 191, 199, 99 S.Ct. 2243, 2248 (1979), the complaint of the contributors should be addressed to the candidate who has chosen to forego private financing, rather than to the courts." Opinion, App. at 55a. To suggest otherwise would lead to the conclusion that a candidate may not accept the choice to campaign without private monies and without indebtedness to any supporters or fundraisers.

Even if the contribution restriction were viewed as one imposed by government rather than as the choice of a candidate as to which type of campaign he or she prefers,

> The public interest in enacting a public funding program and in limiting coordinated contributions to effectuate that program is a considerable one. These limitations 'do not undermine to any material degree the potential for robust and effective discussion of candidates and campaign issues by individual citizens, associations, the institutional press, candidates, and political parties.' 424 U.S. at 29.

Opinion, App. at 56a.

III. Appellants' Claim That the Advantages of Incumbency Render Public Financing Discriminatory Against Challengers Is Unsupported by the Record.[14]

The court below acknowledged, as this Court noted in *Buckley* v. *Valeo,* 424 U.S. at 31-33, that even assuming the advantages of incumbency, and that they may have a significant effect on a particular election, the public financing scheme is a neutral one which does

[14] Appellants have not fully argued this claim to the Court, and it is unclear whether they are appealing its dismissal by the courts below.

not, and should not, attempt to equalize such pre-existing differences in strengths between candidates and parties.[15] Opinion, App. at 58a. *See Ross* v. *Moffitt,* 417 U.S. 600, 611-16 (1974); *San Antonio Independent School District* v. *Rodriguez,* 411 U.S. 1, 24 (1973); *Griffin* v. *Illinois,* 351 U.S. 12, 23 (1956). Nor is a reform statute unconstitutional because it might have gone further than it did. *Katzenbach* v. *Morgan,* 384 U.S. 641, 657 (1966); *Williamson* v. *Lee Optical,* 348 U.S. 483, 489 (1955); *Roschen* v. *Ward,* 279 U.S. 337, 339 (1929).

The contentions made by appellants, Juris. Statement at 18-19, that challengers need spend more to overcome the advantages of incumbency are wholly unsupported by the record and by the findings of the district courts. For example, the courts found that the record demonstrates that once nominated, both challenger and incumbent receive relatively equal media coverage, irrespective of their specific campaign activities.[16] Joint Findings, App. at 35a-36a. Thus, the courts correctly concluded "that the Fund Act does not unlawfully discriminate in favor of incumbent candidates against challengers or deny equal protection to presidential candidates." Opinion, App. at 59a. Indeed, in the only election conducted with public financing, the incumbent was defeated.

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[15] The record in this case supported a finding of only two advantages of incumbency—the use of Air Force I and the value of speechwriting and research facilities of the Executive Branch—which amount to far less than the advantages supported by the record in *Buckley* where this Court refused to sustain a similar challenger discrimination claim. 424 U.S. at 30-35.

[16] Indeed, it was appellants' own exhibit which the courts used to reject these claims, finding that it "belies [their] contention travel to generate news coverage." Joint Findings, App. at 36a.

IV. Appellants' Claim That the Statutes Discriminate Against Candidates Not Supported by Labor Organizations Is Wholly Unsupported by the Record.[17]

The courts found that appellants failed to show that, by engaging in their protected right of internal communication with their membership, and by engaging in non-partisan voter registration and get-out-the-vote drives, labor organizations provide any substantial advantages to certain candidates over others, that Democratic candidates were favored over Republicans, or that, even if they were, Republicans could not and did not obtain comparable support from other groups such as corporations, which have—protected by the statute—and may exercise, the same rights under 2 U.S.C. § 441b. Opinion, App. at 62a; Joint Findings, App. at 41a.

Even had appellants demonstrated that labor support provided substantial advantage to Democratic candidates over others, the courts below would correctly have rejected any claim of discrimination based upon the failure of the neutral public financing statute to equalize differences in level of support for certain candidates by one type of special interest group. Opinion, App. at 61a-62a. *See* cases cited *supra* at 16.

V. Appellants Submitted No Evidence in Support of Their Claims That the Statutes Are Overbroad and in Violation of the Ninth Amendment; Both Claims Were Rejected by This Court in *Buckley* v. *Valeo*.

As noted, these facial constitutional claims were rejected by this Court in *Buckley* v. *Valeo,* 424 U.S. at

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[17] Appellants have not fully argued this claim to the Court, and it is unclear whether they are appealing its dismissal by the courts below. This claim was not certified to the Court of Appeals.

90, 95-96. *See* note 7 *supra*. To establish a claim of overbreadth, it must be demonstrated that, in permissibly prohibiting certain activities, a statute proscribes other activities protected by the first amendment, *United States* v. *Robel*, 389 U.S. 258 (1967), *Erznoznik* v. *City of Jacksonville*, 422 U.S. 205 (1975), and that the alleged overbreadth is "not only real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Broadrick* v. *Oklahoma*, 413 U.S. 601, 611-15 (1973). *Cf. United States Civil Service Commission* v. *National Association of Letter Carriers*, 413 U.S. 548 (1973). When infringement of ninth amendment rights is asserted, the issue is whether the Congress has the granted power to enact the challenged legislation. *United Public Workers* v. *Mitchell*, 330 U.S. 75, 96 (1947); *Griswold* v. *Connecticut*, 381 U.S. 479 (1965). Appellants submitted no evidence in support of these claims, and the courts below correctly dismissed them as wholly without merit because the Fund Act furthers compelling governmental interests in providing the public funding alternative, *Buckley* v. *Valeo*, 424 U.S. at 93, and because Congress' power to implement such an alternative was specifically upheld by this Court in *Buckley* v. *Valeo*, 424 U.S. at 90. Opinion, App. at 62a-63a.

VI. Appellants Cannot Obtain the Relief They Seek.

Appellants seek to have this Court create a $29,440,000.00 subsidy for major party candidates. Such relief is impossible for the following reasons: (1) the expenditure limitation is an integral part of public financing as implemented by Congress, and (2) grave doubt would arise as to the constitutionality of public financing as applied to minor parties were it not for the expenditure limitation.

That public financing was intended to be an alternative system of funding—not a supplement to private financing—is stated in the Fund Act's legislative history, *see* note 6 *supra*, and was affirmed by this Court. "Public funding for candidates of major parties is intended as a *substitute* for private contributions. . .". *Buckley* v. *Valeo*, 424 U.S. at 99 (emphasis added). The legislative history of the Presidential Election Campaign Fund Act demonstrates that, after eliminating the expenditure limitation and contribution prohibition of public financing, it is impossible to conclude that "the legislature would have been satisfied with what remained." *Welsh* v. *United States*, 398 U.S. 333, 364 (1970) (Harlan, J., concurring, quoting from *Champlin Mfg. Co.* v. *Corporation Commission*, 286 U.S. 210, 235 (1932)).

Moreover, the Court concluded in *Buckley* that, were it not for the expenditure limitation contained in the Fund Act, there would be great doubt as to the constitutionality of public financing as applied to minor parties. "[S]ince any major party candidate accepting public financing of a campaign voluntarily assents to a spending ceiling, other candidates will be able to spend more in relation to the major party candidates." *Buckley* v. *Valeo*, 424 U.S. at 99. This Court underscored the importance of the expenditure limitation when it noted that "Subtitle H does not enhance the major parties' ability to campaign; it substitutes public funding for what the parties would raise privately and additionally imposes an expenditure limit." *Buckley* v. *Valeo*, 424 U.S. at 95 n.129. Without the expenditure limitation there is substantial likelihood that the statutory scheme under challenge would be open to attack on grounds of discrimination against minor and

new party candidates, since it would give major party candidates a publicly-subsidized head start in the race for campaign funds.[18]

Appellants seek to have this Court draft a statute which Congress did not pass, and which itself would pose serious constitutional questions. This Court should affirm the unanimous decisions of the three courts below and find the expenditure limitation to be an integral and permissible part of public financing and hold it to be not severable.

CONCLUSION

For the foregoing reasons, the decisions of the courts below should be summarily affirmed.

Respectfully submitted,

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[18] This fear was expressed by Congress, which consciously designed the system to insure fairness for minor parties. S. Rep. No. 93-689, 93d Cong., 2d Sess. 8-9 (1974).